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No. 02-1123

In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

RANJIT SINGH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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Under the statutory provisions that govern this case, which are materially the same as current law, see Pet. 5-6 n.1, respondent's *in absentia* deportation order is not subject to reopening unless respondent shows that his failure to appear at his deportation hearing "was because of exceptional circumstances" (8 U.S.C. 1252b(c)(3)(A) (1994)) "beyond [his] control" (8 U.S.C. 1252b(f)(2) (1994)). Moreover, when the court of appeals reviewed the administrative determination that such "exceptional circumstances" do not exist in respondent's case, it was limited to considering "the reasons for the alien's not attending the proceeding." 8 U.S.C. 1252b(c)(4) (1994).

The petition demonstrates (Pet. 11-15) that the court of appeals overturned respondent's deportation order on grounds—involving its perception of family hardship and the likelihood that respondent would have obtained discretionary relief from deportation if he had appeared

at his deportation hearing—that are not related to "the reasons for the alien's not attending the proceeding," 8 U.S.C. 1252b(c)(4) (1994). Those grounds therefore were beyond the authority of the court of appeals to consider when reviewing a decision of the Board of Immigration Appeals (BIA) declining to reopen a deportation order entered *in absentia.* Moreover, the reason that respondent concedes led to his failure to appear—mere "inaderten[ce]" (Br. in Opp. 6), after receiving written notice of the date and time of the hearing—clearly does not constitute a reason "beyond the control of the alien," much less circumstances as "compelling" as "serious illness of the alien or death of an immediate relative of the alien," which are what 8 U.S.C. 1252b(f)(2) requires. Respondent makes no effort to defend the court of appeals' decision under the explicit statutory text.

The Ninth Circuit's published decision will impose substantial burdens by complicating reopening proceedings. Immigration judges within the Ninth Circuit entered nearly 8000 *in absentia* orders in Fiscal Year 2002. Pet. 16. Also within the Ninth Circuit's boundaries, aliens who failed to appear and had a final order entered against them in Fiscal Year 2002 already had filed more than 1200 motions to reopen as of January 2003. Pet. 18. The precedential decision in this case will require immigration officials and administrative adjudicators to consider, in a large number of reopening proceedings, the merits of aliens' arguments for relief in earlier deportation proceedings, thus nullifying the limitations that Congress placed on reopening cases that aliens defaulted by failing to appear, and creating a substantial new administrative burden. Pet. 16-18.

Because the court of appeals' decision is plainly incorrect, and its harm is great, summary reversal is warranted.[1]

1. Respondent argues that review by this Court is not warranted because the court of appeals cited the correct provisions of the immigration laws, and "at most * * * misapplied the properly stated statutes and rules of law." Br. in Opp. 5. Thus, respondent contends that the court of appeals correctly stated that it could review the BIA's decision only for abuse of discretion (see *ibid.*, citing Pet. App. 2a), but then asserts, inconsistently, that the question of the proper interpretation of "exceptional circumstances" is "a purely legal" one that a court reviews de novo (*ibid.*). Contrary to the latter assertion, this Court has made clear that the Attorney General's interpretation of the immigration laws is entitled to broad deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144-145 (1981) (per curiam) (deferring to Attorney General's interpretation of "extreme hardship" required for suspension of deportation).

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[1] The Immigration and Naturalization Service (INS) was the respondent in the court of appeals and the original petitioner in this Court. See 8 U.S.C. 1105a(a)(3) (1994). On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its functions were transferred to the newly formed Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 116 Stat. 2192, 2195 (6 U.S.C. 251, 271). Respondent challenges a decision of the Board of Immigration Appeals within the Justice Department's Executive Office for Immigration Review. Therefore, the Attorney General has been substituted for the former INS as the petitioner in this case. Cf. 8 U.S.C. 1252(b)(3)(A) (designating Attorney General as proper respondent in petition for review proceedings that arise under post-1996 immigration law).

The BIA's interpretation is that Section 1252b means what it says, and the "exceptional circumstances" that will support a motion to reopen an *in absentia* order are limited to "exceptional circumstances * * * beyond the control of the alien" that caused the failure to appear and that are no "less compelling" than the alien's serious illness or an immediate relative's death. 8 U.S.C. 1252b(c)(3)(A), (f)(2) (1994); see Pet. App. 7a-8a. The court of appeals' view, by contrast, is that a motion to reopen an *in absentia* deportation order must be granted "where the denial leads to the unconscionable result of deporting an individual [who would have been] eligible for relief from deportation" if he had appeared at his deportation hearing. Pet. App. 5a. Determining which interpretation of Section 1252b is correct involves a question of statutory construction that has substantial prospective importance, and that merits this Court's review.

2. Respondent also suggests (Br. in Opp. 6-7, 10-11) that the court of appeals' decision is binding circuit precedent only when it is clear that the alien actually would have avoided deportation if he had appeared for his deportation proceeding. The published opinion is not so limited. Rather, the opinion states that although respondent concededly was deportable, he was "eligible" *to be considered* for discretionary relief from deportation. Pet. App. 2a.[2] It therefore is not surpris-

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[2] Respondent contends that the BIA "would have had no choice but to grant" his petition for adjustment of status, Br. in Opp. 6-7 (citing *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1197 (9th Cir. 2001) (en banc)), and that the court of appeals' decision in this case therefore should be read as limited to situations in which the alien would not have been ordered deported if he had appeared at his hearing. Respondent errs in relying on *Socop-Gonzalez* to narrow the court of appeals' decision, which did not even cite *Socop-Gonzalez*. The relevant passage in *Socop-Gonzalez* simply notes that an approved

ing that in several recent unpublished decisions, the Ninth Circuit has suggested a broad understanding of this case. See *Jale* v. *Ashcroft*, 52 Fed. Appx. 972 (9th Cir. 2003) (focusing on "unconscionable result" language of instant decision); *Olivera-Gutierrez* v. *Ashcroft*, 42 Fed. Appx. 993, 993-994 (9th Cir. 2002) (suggesting that exceptional circumstances exist when the alien has a "reasonable" misunderstanding about the time of his deportation hearing and a "valid claim for relief from deportation"); see also *Chen* v. *INS*, 58 Fed. Appx. 327, 328 (9th Cir. 2003) (remanding in light of instant decision); *Markossian* v. *INS*, 57 Fed. Appx. 762 (9th Cir. 2003) (same); *Demian* v. *INS*, 48 Fed. Appx. 708, 709 (9th Cir. 2002) (same).

Furthermore, even if the instant decision is controlling only when it is thought to be clear that the alien "would not have been deported" (Pet. App. 2a), the decision will have very broad consequences. Under that reading, the facts of each case will have to be reviewed in the reopening proceeding to determine the strength of the alien's application for relief in the earlier deportation proceeding.[3] That judicial mandate will convert thousands of proceedings involving the

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visa petition is a necessary condition for granting adjustment of status. See 272 F.3d at 1197. Even when that condition of eligibility is satisfied, it remains a matter of discretion for the immigration judge or the BIA whether to grant an application for adjustment of status.

[3] See, *e.g.*, *Garewal* v. *Ashcroft*, No. 02-70798, 2003 WL 21206151, at *1 (9th Cir. May 20, 2003) (unpublished decision) (suggesting that reopening is required under instant decision when alien made a "strong showing of entitlement to relief" in the underlying proceeding); *Lopez-Palomino* v. *Ashcroft*, 61 Fed. Appx. 507, 508 (9th Cir. 2003) (reopening not required under instant decision if discretionary relief was possible, rather than certain, in the underlying proceeding).

reopening of *in absentia* orders—which now are very limited in scope due to statutory restrictions that focus the inquiry on whether the aliens' reasons for failing to appear were truly compelling and beyond their control—into quasi-merits proceedings that address the same questions that would have been resolved if the aliens had not defaulted on their applications for relief in the first place. See Pet. 17-18.

3. Respondent contends that there is no substantial conflict among the courts of appeals about the correct application of the "exceptional circumstances" limitation. He suggests (Br. in Opp. 9) that no direct conflict exists because the published decisions discussed in the petition (Pet. 15-16) do not involve aliens with approved visa petitions. As explained above, however, the Ninth Circuit's decision in this case is not limited to the precise facts in this record, and the decision has not been so understood by other Ninth Circuit panels. The circuit conflict described in the petition—involving whether the statutory "exceptional circumstances" limitation permits consideration of circumstances beyond the alien's reasons for failing to appear, which no other court of appeals has allowed, see Pet. 15-16—warrants resolution by this Court.[4]

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[4] Respondent's assertion (Br. in Opp. 8) that the Ninth Circuit's decision in this case is support by *Chowdhury* v. *Ashcroft*, 241 F.3d 848 (7th Cir. 2001), is incorrect. As the petition explains (see Pet. 16 n.3), *Chowdhury* did not address the reopening of *in absentia* orders.

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The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the court of appeals.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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